

## OBVIOUS RISK & DANGEROUS RECREATIONAL ACTIVITY (14 November 2012)

### INTRODUCTION

1. This topic concerns Divisions 4 and 5, Part 1 *Civil Liability Act 2002* entitled respectively “Assumption of Risk” and “Recreational Activities”.
2. These divisions were introduced by the *Civil Liability Amendment (Personal Responsibility) Act 2002* which was assented to on 28 November 2002. Divisions 4 and 5 commenced their operation on 6 December 2002. Their operation was retrospective however although not applying in respect of proceedings already commenced prior to that date<sup>1</sup>.
3. As is well known, the legislative reforms which were introduced by that amending Act had been the subject of consideration and recommendations by the committee chaired by the Honourable David Ipp AO QC, Ipp JA as he then was, which had reported in September 2002<sup>2</sup>. The reforms in Divisions 4 and 5 go further than the recommendations in the Ipp Report however.
4. The operation of Divisions 4 and 5 depend upon the key concepts of “obvious risk”, “recreational activity” and “dangerous recreational activity”.
5. “Obvious risk” is the only one of these known previously to the common law. It was a source of some confusion at common law. The *Civil Liability Act 2002* has confined its direct application to two specific areas, namely cases in which the defendant’s alleged liability rests wholly or partly on a failure to warn the plaintiff of a risk of harm and where the plaintiff’s harm results from his or her participation in a dangerous recreational activity.
6. The statutory concept of “obvious risk” can be seen to serve one of the policy ends of the *Civil Liability Act* reforms, namely the restoration of public confidence in the operation of tort law by greater recognition of personal responsibility<sup>3</sup>. Specifically the

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<sup>1</sup> *Civil Liability Act 2002 Schedule 1 cl.6*

<sup>2</sup> The full title of the report is “*Review of the Law of Negligence Final Report*” and it is available online at [http://revofneg.treasury.gov.au/content/Report2/PDF/Law\\_Neg\\_Final.pdf](http://revofneg.treasury.gov.au/content/Report2/PDF/Law_Neg_Final.pdf)

<sup>3</sup> *Civil Liability Amendment (Personal Responsibility) Bill 2002* Second Reading Speech 23.10.02 Parliament of NSW Hansard p.5764

introduction of the statutory concept facilitates the rehabilitation of the all but defunct common law defence of *volenti non fit injuria* ie voluntary assumption of risk.

7. The concepts of “recreational activity” and “dangerous recreational activity” were introduced to implement another of the policy drivers of the reforms, namely to prevent the cost of public liability insurance rendering the provision of recreational services, which by their nature involve risk of harm, prohibitively expensive.

## OBVIOUS RISK

### Common Law Background

8. The concept of “obvious risk” was explored in a number of appellate decisions in the years preceding, and immediately following the enactment of the *Civil Liability Act 2002*. These decisions concerned common law principles as the relevant proceedings had been commenced prior to the Act coming into operation.
9. In *Brodie v Singleton Shire Council* and *Ghantous v Hawkesbury City Council*<sup>4</sup> the High Court was concerned with, among other things, the formulation of a council’s positive obligations to undertake repairs to public footpaths. According to the plurality judgment this required that “a road (ie including a footpath) be safe not in all circumstances but for users exercising reasonable care for their own safety”<sup>5</sup>.
10. The *Ghantous* case involved a pedestrian accident and the judgment referred to the expectation that pedestrians take reasonable care to avoid the ordinary and obvious imperfections and hazards on footpaths. However this was qualified by the recognition that in certain circumstances “there may be a foreseeable risk of harm even to persons taking reasonable care for their own safety”.
11. In a different context, one involving a fall at night while inebriated from cliffs at a public reserve, Kirby J said “(w)hile account must be taken of the possibility of inadvertence or negligent conduct on the part of entrants, the occupier is generally entitled to assume that most entrants will take reasonable care for their own safety ... Where a risk is obvious to a person exercising reasonable care for his or her own

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<sup>4</sup> [2001] HCA 29

<sup>5</sup> At [163]

safety, the notion that the occupier must warn the entrant about that risk is neither reasonable nor just”<sup>6</sup>.

12. However these statements needed to be clarified in subsequent decisions. They did not mean that no duty of care was ever owed to those who were not careful and did not keep a proper lookout. Rather, in circumstances where the relationship between defendant and plaintiff was such that a duty was owed, then obviousness of the risk of injury had to be taken into account in formulating the scope of the defendant’s duty and the closely related question of considering whether the circumstances surrounding the injury gave rise to a breach<sup>7</sup>.
13. In other words, obvious risk went to content and breach of the duty. Moreover in formulating the content or scope of the defendant’s duty, and applying the familiar *Wyong Shire Council v Shirt*<sup>8</sup> test for determining breach, the fact that the plaintiff may not be or have been careful did not negate the duty nor preclude a finding of breach. Both matters would go to the factor characterised in the *Shirt* calculus as “magnitude of the risk”.
14. Logically there would no scope for the partial defence of contributory negligence if no duty was ever owed to those who did not exercise reasonable care for their own safety<sup>9</sup>. The issue of contributory negligence only arises on the assumption that the defendant owed and breached a duty of care in the first place.
15. It goes without saying that obvious risk goes to contributory negligence itself. If the risk would be obvious to a person exercising reasonable care for his or her own safety then the fact that it materialised points strongly towards a finding of contributory negligence. The liability of the defendant is reduced according to the contribution of the plaintiff’s own lack of care in terms of culpability and causative significance.
16. However the contributory negligence apportionment legislation<sup>10</sup> operates on the premise of shared responsibility and 100% apportionment against the plaintiff was

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<sup>6</sup> *Romeo v Conservation Commission of the Northern Territory* [1998] HCA 5 at [123]

<sup>7</sup> See for example in the case of footpaths, the discussion by Giles JA in *Temora Shire Council v Stein* [2004] NSWCA 236 at [26] – [42] and, in “diving cases” by McHugh, Gummow and Hayne JJ in *Vairy v Wyong Shire Council* [2005] HCA 62

<sup>8</sup> [1980] HCA 12 at [14] and [15]

<sup>9</sup> *Thompson v Woolworths (Qld) Pty Ltd* [2005] HCA 19 at [37]

<sup>10</sup> In NSW, *Law Reform (Miscellaneous Provisions) Act 1965* s.9

not permissible, at least until the recommendation of the Ipp Committee was accepted that this prohibition be removed<sup>11</sup>.

17. The complete defence at common law of *volenti non fit injuria* ie voluntary assumption of risk likewise was predicated upon breach of duty of care by the defendant. It requires the defendant to prove that the plaintiff fully understood the extent of the risk of injury, including that posed by negligence on the part of the defendant, and chose to accept or ignore it<sup>12</sup>.
18. It would come as no surprise that the defence has its best track record in circumstances in which the plaintiff has agreed to being driven by an obviously intoxicated defendant, although not unknown to succeed in other circumstances<sup>13</sup>.

### Definition of “Obvious Risk”

19. The first provision in Division 4, s.5F, sets out what is meant by “obvious risk”:

#### 5F Meaning of “obvious risk”

(1) For the purposes of this Division, an *obvious risk* to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.

(2) Obvious risks include risks that are patent or a matter of common knowledge.

(3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.

(4) A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.

20. The definition begins “for the purposes of this Division”. The definition does not purport to have any bearing on issues that arise under provisions of the Act outside Part 1 Division 4 (other than Division 5 which adopts the s.5F definition). In particular it does not have any bearing on questions of standard of care or breach of duty that

<sup>11</sup> *Wynbergen v Hoyts Corporation Pty Ltd* [1997] HCA 52, although under s.5S *Civil Liability Act 2002* a court is now permitted to determine a reduction of damages of 100% if it considers it just and equitable to do so

<sup>12</sup> *Woods v Multi-Sport Holdings Pty Ltd* [2002] HCA 9, *James Paltidis v State Council of YMCA Association of Victoria Inc* [2006] VSCA 122

<sup>13</sup> Eg *Imperial Chemicals Ltd v Shatwell* [1965] AC 656 in which blasting technicians who took a short cut in testing detonators already wired to the explosives were denied recovery

arise under s.5B: *Carey v Lake Macquarie City Council*<sup>14</sup>. Moreover, a finding that a risk of harm was obvious within the meaning of s.5F has no more bearing on the question of breach of duty under s.5B *Civil Liability Act 2002* than would a finding of obvious risk under a common law regime affect application of the *Shirt* calculus<sup>15</sup>.

21. The test applied is both objective and subjective. The concept is engaged where a risk would be obvious to a reasonable person, but only a reasonable person in the plaintiff's position. If the plaintiff is a 7 year old child, as in *Doubleday v Kelly*<sup>16</sup> then it is a reasonable 7 year old child to whom the risk must be obvious. The "position of the plaintiff" refers not only to the plaintiff's personal characteristics but also to the circumstances in which the risk arose and the harm was suffered<sup>17</sup>.
22. In *Dederer v RTA of NSW*<sup>18</sup> Dunford J noted that the reference to "risk" in the section must be to the risk of harm rather than to some general danger presented by the circumstances. However the precise nature of the injury itself need not be obvious.
23. The most obvious thing about the definition is that it does not define "obvious" itself. That is left to the general law. In *Vairy v Wyong Shire Council*<sup>19</sup> Tobias JA adopted the definition in §343A of the Restatement (Second) of Torts (1965) (Rest 2d Torts §343A), namely "'Obvious' means that both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the (plaintiff), exercising ordinary perception, intelligence, and judgment". "Condition" in this context, Tobias JA explained, meant the factual scenario facing the plaintiff. For example, in a "diving case", the fact that the plaintiff was faced with water of unknown depth.
24. The definition is, with the greatest respect, not of much assistance. It has been referred to in subsequent decisions, but not with much enthusiasm. Perhaps "obvious", like the formula "beyond reasonable doubt" with which juries are presented, is best left to the intuitive understanding of the judge.

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<sup>14</sup> [2007] NSWCA 4 at [34] per McClellan CJ at CL, see also *Perrett v Sydney Harbour Foreshore Authority* [2009] NSWSC 1026 at [46] per McCallum J

<sup>15</sup> *Angel v Hawkesbury City Council* [2008] NSWCA 130 at [83] – [86]

<sup>16</sup> [2005] NSWCA 151 at [28], see also *Waverley Council v Ferreira* [2005] NSWCA 418, a case involving a 12 year old boy

<sup>17</sup> *Fallas v Mourlas* [2006] NSWCA 32 and *Angel v Hawkesbury City Council* [2008] NSWCA 130 at [61]

<sup>18</sup> [2005] NSWSC 185 at [86]

<sup>19</sup> [2004] NSWCA 247 at [161]

25. It is not only the “obvious” in “obvious risk” which poses difficulties of application. Identifying the “risk” in the factual matrix of an accident for purposes of testing its obviousness can be equally difficult<sup>20</sup>. However that is best considered in connection with the two functions which the concept of “obvious risk” performs in Divisions 4 and 5 respectively.

#### **Significance of Obvious Risk in Division 4**

26. The consequences of a finding that a risk of harm was obvious are set out in sections 5G and 5H which provide:

##### 5G Injured persons presumed to be aware of obvious risks

(1) In proceedings relating to liability for negligence, a person who suffers harm is presumed to have been aware of the risk of harm if it was an obvious risk, unless the person proves on the balance of probabilities that he or she was not aware of the risk.

(2) For the purposes of this section, a person is aware of a risk if the person is aware of the type or kind of risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk.

##### 5H No proactive duty to warn of obvious risk

(1) A person (*the defendant*) does not owe a duty of care to another person (*the plaintiff*) to warn of an obvious risk to the plaintiff.

(2) This section does not apply if:

- (a) the plaintiff has requested advice or information about the risk from the defendant, or
- (b) the defendant is required by a written law to warn the plaintiff of the risk, or
- (c) the defendant is a professional and the risk is a risk of the death of or personal injury to the plaintiff from the provision of a professional service by the defendant.

(3) Subsection (2) does not give rise to a presumption of a duty to warn of a risk in the circumstances referred to in that subsection.

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<sup>20</sup> See for example the comments of Bryson JA in *CG Maloney Pty Ltd v Hutton-Potts* [2006] NSWCA 136 at [173] – [174].

27. Section 5G is essentially a paraphrase of the Ipp Committee's Recommendation 32 with the exception that the Recommendation commenced with the prefatory words "(f)or the purposes of the defence of assumption of risk". Section 5H was "new". It had no analogue in the Ipp Report.
28. The discussion which follows of the operation of ss.5G and 5H is brief as there have been few cases in which "obvious risk" as a "gateway" to these sections has been the mainstay of the plaintiff's case. It has been relied upon more often, and more effectively, in cases in which the defence has been that the plaintiff's injuries represented the materialisation of an obvious risk of a dangerous recreational activity within the scope of Division 5.
29. That s.5G was not introduced expressly as relevant to the assumption of risk defence hardly matters when it appears in a division entitled "Assumption of Risk"<sup>21</sup>. Its purpose is clearly to assist the defendant in satisfying the requirement of the *volenti* defence as to the plaintiff's subjective knowledge of the risk of injury. It does so by creating a rebuttable presumption of such knowledge if the relevant risk was "obvious" within the meaning of s.5F.
30. This was made clear by the judgment of Santow JA, with whom McColl and Bryson JJA agreed in *CG Maloney Pty Ltd v Hutton-Potts*<sup>22</sup>. In that case the plaintiff had slipped on liquid floor polish while crossing a surface which the defendant's cleaner had been about to polish. She did not see the cleaner, nor a sign he had put in place, which was obscured from the plaintiff's view in any event. The polish itself was virtually invisible.
31. The Court of Appeal upheld the trial judge's rejection of the argument that, in the circumstances in which the plaintiff found herself, the risk of slipping on the polish was "obvious" within the meaning of s.5F. The plaintiff had conceded that if she had been aware of the presence of the cleaner she would have taken more care. However the presence of the cleaner alone did not point to the presence of polish on the floor and therefore did not render the risk of slipping "obvious" to a reasonable person in the plaintiff's position. The plaintiff's failure to observe the cleaner sounded only in contributory negligence.

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<sup>21</sup> Headings to, among other things, Divisions, being, by virtue of s.35(1) *Interpretation Act 1987* "part of the Act" and available in aid of construction

<sup>22</sup> [2006] NSWCA 136 at [101]

32. Even if the presence of the cleaner had been held to give rise to a risk of slipping on polish obvious to a reasonable person in the plaintiff's position, the resulting presumption that the plaintiff was aware of the risk would have been rebutted in any event as the trial judge accepted that the plaintiff had not seen the cleaner.
33. *Jaber v Rockdale City Council*<sup>23</sup> was a diving case. The plaintiff conceded that he could only succeed against the Council if he could establish that the Council had negligently failed to warn swimmers that the waters surrounding the pier from which the plaintiff dived were too shallow for this to be done safely. Accordingly, if the risk of injury from doing so was obvious then the claim would fail by operation of s.5H<sup>24</sup>.
34. The Court of Appeal upheld the trial judge's findings that the risk of injury was both one of which the plaintiff was subjectively aware and one which would have been obvious to a reasonable person in his position. It therefore upheld the dismissal of the claim on the basis of the Council's successful reliance on s.5H.
35. These cases neatly illustrate the differing fields of operation of ss.5G and 5H. In *CG Maloney* "obvious risk" was argued as a "gateway" to s.5G and the voluntary assumption of risk defence. Neither at first instance nor on appeal was it necessary to consider how such a defence would have fared as the obvious risk contention failed. In *Jaber* the plaintiff's case was confined to one of failure to warn. Obvious risk there was argued as a gateway to s.5H. Once it was established, the plaintiff's claim had to fail as any duty to warn was foreclosed by s.5H.
36. In *Carey v Lake Macquarie City Council* McClellan CJ at CL discussed<sup>25</sup> at some length the requirements of the defence of voluntary assumption of risk emphasising that knowledge of a risk of injury is not sufficient to make out the defence and that full comprehension and free agreement to run the risk must be proved. Section 5G operates to deem knowledge only, and even then, subject to rebuttal. It is clear from His Honour's discussion that he did not believe that the enactment of ss. 5F and 5G have significantly facilitated reliance on the defence.

## DIVISION 5 – RECREATIONAL ACTIVITIES

### Key Definitions

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<sup>23</sup> [2008] NSWCA 98

<sup>24</sup> *Jaber* at [32]

<sup>25</sup> [2007] NSWCA 4 at [70] – [109]

37. These are as follows:

5K Definitions

In this Division:

*dangerous recreational activity* means a recreational activity that involves a significant risk of physical harm.

*obvious risk* has the same meaning as it has in Division 4.

*recreational activity* includes:

- (a) any sport (whether or not the sport is an organised activity), and
- (b) any pursuit or activity engaged in for enjoyment, relaxation or leisure, and
- (c) any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure.

38. The first of the operative provisions is s.5L which provides:

5L No liability for harm suffered from obvious risks of dangerous recreational activities

- (1) A person (*the defendant*) is not liable in negligence for harm suffered by another person (*the plaintiff*) as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff.
- (2) This section applies whether or not the plaintiff was aware of the risk.

39. The definition of “recreational activity” is inclusive and broad and has been interpreted broadly. In *Belna Pty Ltd v Irwin*<sup>26</sup> the Court of Appeal had to consider whether gymnasium work with a view to losing weight and getting fit fell within its meaning. Possibly revealing more of his personal views concerning such activities than he intended the trial judge had held that they were not recreational. However Ipp JA, with whom McColl JA and Handley AJA agreed, did not see physical exercise in such narrow terms and held that the plaintiff’s abortive attempt to perform lunges at a

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<sup>26</sup> [2009] NSWCA 46

Fernwood facility involved her participating in a recreational activity within the definition in s.5K.

40. Although the plaintiff's participation in recreational activities *per se* gives rise to potential defences under ss. 5M "No duty of care for recreational activity where risk warning" and 5M "Waiver of contractual duty of care for recreational activities", it is the defence under s.5L which has been the most litigated.
41. That it has been most litigated is not surprising. It operates in an area – "dangerous recreational activities" – which, by its very nature, gives rise to serious injuries. Moreover it affords a complete defence provided it can be shown, the onus lying upon the defendant<sup>27</sup>, that the plaintiff's injury was suffered "as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in" by him or her.
42. In *Falvo v Australian Oztag Sports Association*<sup>28</sup> Ipp JA, with whom Adams J and Hunt AJA agreed, said that "significant risk of physical harm" in the definition of "dangerous recreational activity" had to be read as a whole, in effect, distributively, so as to require not only a significant risk but also a risk of significant injury. Due regard also had to be paid to the word "dangerous".
43. This led His Honour to dismiss the suggestion that Oztag, a sport requiring athleticism but little physical contact and use of a soft ball, was a dangerous recreational activity.
44. The definition was subjected to further analysis in *Fallas v Mourlas*, a decision which illustrates the genuine difficulties of its application and also of application of the concept of "obvious risk" upon which the defence under s.5L depends.
45. The plaintiff, defendant and two others were engaging in some nocturnal kangaroo shooting, known as "spotlighting". The defendant was the only holder of a firearms licence. The plaintiff had been deputised to shine the spotlight out of the car windows at the target kangaroos while the others shot, initially from inside the car but later from outside walking in front of the car.

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<sup>27</sup> *Fallas v Mourlas* [2006] NSWCA 32 per Ipp JA at [122] – [123], Ipp JA agreeing, at [24]

<sup>28</sup> [2006] NSWCA 17

46. At some stage the defendant rejoined the plaintiff in the car holding a handgun. Not for the first time the plaintiff remonstrated with him about bringing loaded guns into the car and waving them about. The defendant continued to reassure the plaintiff that the handgun was not loaded. However as he tried various means of unjamming the gun, it accidentally discharged hitting the plaintiff in the leg.
47. Unsurprisingly the trial judge found negligence established but somewhat more surprisingly rejected the defence based on s.5L. On appeal the only issue was whether s.5L could be relied upon. The question was therefore whether the shooting of the plaintiff could properly be characterised as the materialisation of an obvious risk of a dangerous recreational activity.
48. In terms of whether what the plaintiff was doing was a “dangerous recreational activity”, Ipp JA considered that the risk of physical harm involved was “significant” if the prospect of the harm occurring lay somewhere between “trivial” and “likely”. His Honour saw the risk of accidental discharge of a loaded gun in close proximity to each other as a significant risk of shooting kangaroos by spotlight and so concluded it was a dangerous recreational activity.
49. His Honour noted that in cases involving injury by conduct of others, rather than by natural features of land for example, the effect of s.5L would usually be acceptance of another person’s negligence. That negligence would be within the scope of “obvious risk” but not gross negligence. In this case the conduct of the defendant was so grossly negligent, having regard to the concerns voiced by the plaintiff and the defendant’s repeated reassurances that it fell outside the scope of obvious risk.
50. Accordingly Ipp JA held that while the plaintiff’s injuries represented a risk of a dangerous recreational activity, they did not represent an obvious risk.
51. Tobias JA considered that detailed scrutiny of the activity in which the plaintiff was engaged was necessary to determine the significance of the risk of harm. Having regard to the participants’ relative inexperience with shooting and their apparent exuberance fuelled to some extent by alcohol, there was a significant risk of harm involved.
52. In terms of whether the shooting of the plaintiff was the materialisation of an obvious risk, His Honour considered that, objectively, the plaintiff had good reason to

anticipate an accident in circumstances where the defendant's reassurances that the gun was not loaded would have been unpersuasive given his complaints that it was jammed and his continuing attempts to fix it. His Honour considered the requirement concerning "obvious risk" had been made out and the defence should have succeeded.

53. Basten JA considered the test for "dangerous recreational activity" to be an objective one, independent of the participants' states of mind. In the scheme of the Act the defence based on obvious risk of a dangerous recreational activity stood in contrast to that of voluntary assumption of risk envisaged by Division 4 and which required examination of the plaintiff's subjective understanding.
54. His Honour felt that the mere involvement of firearms should not render a recreational activity *a priori* "dangerous" but some evidence was necessary before spotlight shooting of kangaroos in the circumstances in which it was carried on this case, could be shown to involve significant risk of harm. Despite Tobias JJA having come to just such a conclusion based on the evidence of inexperience, exuberance and alcohol, Basten JA did not believe that such a case had been made out, or even *made*, by the defendant.
55. His Honour canvassed the possibility of statistical evidence providing a foundation for finding a recreational activity to be attended with significant risk but, again, no such evidence was available concerning spotlight kangaroo shooting.
56. In relation to the question of whether the plaintiff's injury was the materialisation of an obvious risk Basten JA noted the difficulty of defining the risk having regard to the different levels of abstraction and particularity with which the circumstances can be analysed. For example was the risk that of being shot generally or was it necessary to consider the risk of being shot while sitting in the car?<sup>29</sup>.
57. However, given the s.5F(3) expressly embraces the possibility that a risk of low probability may still be obvious, the discharge of a loaded firearm in the confines of the vehicle, did, according to Basten JA satisfy the requirement of materialisation of an obvious risk.

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<sup>29</sup> This was a point made by Bryson JA in *CG Maloney Pty Ltd v Hutton-Potts* [2006] NSWCA 136 at [173] – [174]

58. In the result the appeal was dismissed 2-1. Unfortunately in the absence of any real unity of approach, the case stands for little except the difficulty of identifying clear criteria for defining dangerous recreational activities and obvious risks thereof. However the aspect of the definition of “obvious risk” ultimately relied on by Basten JA, that low probability does not preclude a risk being “obvious”, suggests some statutory encouragement to take a broader view of “obvious” than perhaps was taken by Ipp JA in that case.
59. Other cases have been less problematic. In *Smith v Perese*<sup>30</sup> Studdert J held that s.5L was not engaged. The plaintiff had been run over by a boat while spearfishing. He was observing recommended safety procedures and methods of signalling his presence below the water and had never, in his long experience, suffered any actual or threatened injury. While acknowledging that spearfishing may, in other circumstances be attended with significant risk of injury, it was not in the circumstances in which the plaintiff’s accident occurred.
60. In *Lormine v Xuereb*<sup>31</sup> the allegedly dangerous recreational activity was dolphin spotting on a cruise boat sailing ocean waters. The allegation was rejected but the Court of Appeal<sup>32</sup> took the opportunity to provide a concise summary of the requirements of s.5L derived from the discussions in *Falvo* and *Fallas*.
61. *Great Lakes Shire Council v Dederer*<sup>33</sup> was a diving case. It involved claims by the catastrophically injured plaintiff against both the Great Lakes Shire Council and the RTA of NSW both of which, it was alleged, exercised control over the Forster/Tuncurry bridge from which, at the age of 14, he had dived. The Council was joined to the proceedings after the *Civil Liability Act 2002* and hence the Act applied to the claim against it but not the claim against the original defendant, the RTA.
62. The trial judge had no difficulty concluding that diving from a bridge into water of unknown depth constituted a dangerous recreational activity but, oddly, held that injury sustained in the activity was not the materialisation of an obvious risk. His Honour’s decision in this regard was overturned by the Court of Appeal largely on the grounds of its dependence upon the evidence of the plaintiff as to his subjective

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<sup>30</sup> [2006] NSWSC 288

<sup>31</sup> [2006] NSWCA 200

<sup>32</sup> at [31]

<sup>33</sup> [2006] NSWCA 101

awareness rather than what would be obvious to a reasonable 14 year old in his shoes.

63. While the defence under s.5L was upheld<sup>34</sup> in another diving case, *Jaber*, it was rejected in *Laoulach v Ibrahim*<sup>35</sup>. In this case the plaintiff had dived from a boat moored in Botany Bay. The circumstances that many others had dived safely that afternoon and the conditions under which the plaintiff dived appeared benign.
64. For purposes of considering whether the plaintiff had been engaged in a dangerous recreational activity Tobias JA applied the “detailed level of abstraction” approach to the activity in which the plaintiff was engaged. He concluded that the “significant risk of harm” was not present. However the plaintiff’s catastrophic injuries were nevertheless the materialisation of an obvious risk within the meaning of s.5F as the relatively low probability of their occurrence did not preclude such a solution having regard to s.5F(3).
65. The cases, particularly *Smith v Perese* and *Laoulach* but also *Fallas* manifest a curious disconnect between “significant risk of harm” and “obvious risk”. A risk may be significant in terms of harm eg suffering a spinal fracture or being shot, but of insufficient likelihood to be a sufficient risk for purposes of the “dangerous recreational activity” assessment. Nevertheless, no doubt because it is human nature to imagine, if not anticipate, the worst outcomes, such outcomes are “obvious risks” as they are not precluded from being so by their low probability of occurrence.

## CONCLUSION

66. It is still too early to assess the effect of Division 5, Part 1A *Civil Liability Act 2002* in its entirety. However the decisions on Division 4 suggest that the defence under s.5H in cases involving alleged failures to warn has operated according to its intentions. The anticipated revival of the defence of voluntary assumption of risk seems less likely to occur and the difficulties inherent in reliance on this defence may have been underestimated.
67. The defence under s.5L of Division 5 - “materialisation of an obvious risk of a dangerous recreational activity” requires a complex analysis of the factual matrix. This renders prediction of outcomes difficult and manipulation of outcomes relatively

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<sup>34</sup> or would have been upheld had the claim not failed by operation of s.5H.

<sup>35</sup> [2011] NSWCA 402

easy by analysis of the matrix at differing levels of abstraction. It may be that the provisions require more intensive testing in further appellate litigation before they are fully understood.

**14 November 2012**

**Colin Purdy**

**Edmund Barton Chambers**